IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

JASON CURRY,)	CIVIL No. 4:02-CV-10233
)	
Plaintiff,)	
)	
VS.)	
)	
THE HON COMPANY, a Hon Industries)	ORDER
Company, JULIE LINK, and DAN FRERE,)	
)	
Defendants,)	

The Court has before it the combined defendants' motion for summary judgment, filed December 12, 2003. Plaintiff resisted the motion January 2, 2004, and defendants filed a reply on January 7, 2004. The motion is fully submitted.

I. BACKGROUND

The following relevant facts either are not in dispute or are viewed in a light most favorable to plaintiff.

Defendant HON Company ("HON") is an Iowa-based manufacturer and marketer of office furniture. HON Industries, Inc., is the corporate parent of HON and its sister companies.

Headquartered in Muscatine, Iowa, HON operates manufacturing facilities throughout the United States.

Plaintiff Jason Curry was employed by HON for a number of years. Beginning in 1992, Curry served as a supervisor of the manufacturing line at HON's Oak Steel facility in Muscatine. As a line supervisor, Curry managed approximately 40 employees, ordered supplies and scheduled work. He

performed well as a group leader, and was an above average employee who was not a discipline problem.

Plaintiff also owns a business, Curry's Backhoe Service, Inc. ("Curry's Backhoe"). Curry's Backhoe is a fairly diverse construction business providing snow removal, backhoe, septic, dirt hauling and over-the-road trucking services. Plaintiff started the business in 1997 or 1998 and incorporated it in 2002. Curry's Backhoe employs approximately fifteen persons and owns eleven trucks, as well as a backhoe, tractors and other equipment. HON does not prohibit employees from owning outside businesses, and plaintiff's supervisor at HON, Dan Frere, has long been aware that plaintiff owned such a business.

Plaintiff injured his back when he slipped on the ice while working for Curry's Backhoe.

Plaintiff indicated he suffered a "bulging disk," and was incapacitated for a period of several weeks, from December 2000 to April 2001. Deposition of Jason Curry ("Curry Dep.") at 23-24.

HON provides general benefits to its employees, including short-term disability benefits. Under HON's short-term disability policy, plaintiff received the equivalent of 100% of his pay for several weeks from December 19, 2000 until April 2001. HON's Implementation and Procedure - Medical Leave of Absence policy specifically states that "except where rehabilitative employment (work hardening program) would serve as a return to work accommodation, members may not perform any other type of work during a medical leave. The leave will be automatically terminated as of the date the Company confirms other employment." HR Policy Implementation and Procedure - Medical Leave of Absence, attached to Declaration of Julie Link.

Plaintiff reported to HON regularly while receiving short-term disability benefits, and generally

indicated he would be returning to work in a couple of weeks. At some point following his injury, plaintiff talked with Julie Link, member and community relations generalist for HON, as well as his supervisor, Frere, about returning to work on a part-time basis, and was informed he should not return "until he was 100 percent." Curry Dep. at 33. He also asked about possible light-duty positions that he knew had been provided to others, but was told he would have to undergo a physical examination, which in essence required him to "be at 100 percent." *Id.* at 35.

In late March or early April 2001, Link received a telephone call from Sue Grinko Fink, a safety technician for HON's Oak Street plant. Grinko Fink told Link that she had seen plaintiff beating on the tailgate of a truck and observed him walk over to the truck with no limp. Link reported her conversation with Grinko Fink to Frere. Frere also received several complaints from HON "members" or co-workers that plaintiff was working for his own business while collecting disability income from HON.¹

Frere and Link subsequently met with General Manager Harrell Ward and Group Member and Community Relations Manager Al Riddle. They reviewed the leave of absence request form that

¹ These statements are not considered to prove the truth of the reports made to Frere, but rather, to show HON was on notice that plaintiff's physical limitations may have been exaggerated. Plaintiff denied generally this "fact", as well as several facts pertaining to his ultimate termination, in his "Response to Defendant's Statements of Material Facts." Significantly, however, plaintiff did not provide a specific citation to the record, as is required under Local Rule 56.1(b), nor could the Court "match" any of plaintiff's denials with the additional facts outlined in plaintiff's "Statement of Additional Facts Precluding Summary Judgment." Accordingly, the relevant facts at issue are deemed admitted. *See* Local Rule 56.1(b) ("A response to an individual statement of material fact that is not expressly admitted must be supported by references [to the record]. The failure to respond, *with appropriate citations to the appendix*, to an individual statement of material fact constitutes an admission of that fact.") (emphasis added).

plaintiff signed in order to receive a medical leave of absence from HON. It was decided that Frere and Link should investigate the matter.

On April 2, 2001, Link and Frere drove approximately ten miles to Grandview, Iowa.

They witnessed plaintiff climb in and out of the cabs of large dump trucks and backhoes. Link and Frere spoke with plaintiff and returned to HON. Later that day, Link received a call from an Oak Steel plant employee informing her that plaintiff had called a co-worker and told him he had been "busted" working while on medical leave.² Link reported the conversation to Frere and Link's supervisor, Brian Bedard.

The next day, Frere, Bedard and Link met with plaintiff to determine if there was any reason they should not terminate plaintiff's employment for misrepresenting to HON that he was disabled from work. Plaintiff asked to tape record the meeting, and was allowed to do so.

Plaintiff did not deny that he had been operating dump trucks and backhoes for Curry Backhoe, but explained that he had received permission from his chiropractor to engage in such activities as "rehabilitative employment." Link Declaration at ¶ 23. Bedard called plaintiff's chiropractor, who informed him that the only time plaintiff had asked him about "rehabilitative employment" was on the previous day. Bedard, Frere and Link then concluded that plaintiff had only called his chiropractor to "cover his tracks" after Link and Frere observed him performing physical labor. 3 *Id.* at ¶ 25. Frere, Bedard and Link decided to terminate plaintiff from his employment with

² This evidence is not considered to establish the truth of the statement, but as relevant to the supervisors' states of mind in deciding to terminate plaintiff.

³ Again this evidence is not considered to establish the truth of the statement, but as relevant to the supervisors' states of mind in deciding to terminate plaintiff.

HON.

Plaintiff stated in deposition that because of his back injury he suffers pain, and must alternate between sitting and standing. He regularly visits a chiropractor for treatment.

When asked to describe how the back problem has changed his life, plaintiff responded:

Basically from that night I was unable to do a lot of things that I had previously done. It was the middle of winter. I had contracts for snow removal that I had to fulfill. I had to hire people to do the work because I was unable to do the work. I went to work the following morning after it happened and went home a couple of hours into my shift because I was in a lot of pain; went home went to the doctor. He took me off work then, and I was off work until I was terminated.

Id.. at 24-25.

Plaintiff indicated his back injury continues to prevent him from performing some of the physical tasks he performed in the past, such as digging. In addition, he no longer waterskis or plays tackle football with his children. Plaintiff still owns and operates a boat and plays catch with his children, however. He is able to walk slowly, although states he could not "complete a marathon." *Id.* at 29.

Plaintiff also performs the tasks associated with owning his business, including driving trucks and operating machinery. In fact, plaintiff stated in deposition that his chiropractor told him that engaging in his "normal activities," which include operating heavy equipment such as a backhoe and truck, would be "rehabilitative." *Id.* at 32.

As of the date of his deposition on September 30, 2003, plaintiff was not under any work restrictions. He completes exercises prescribed by his chiropractor, uses an at-home therapeutic massager, and receives periodic manipulations performed by his chiropractor. Plaintiff indicated he still is able to use a treadmill, Stairmaster machine, and lift weights. He is contemplating surgery as a last

resort.

Plaintiff filed the present complaint on May 17, 2002. Count I of his complaint alleges defendant HON discriminated against him based on his disability in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 1211, et seq. Count II sets forth a parallel cause of action against HON, Link and Frere under the Iowa Civil Rights Act ("ICRA"), Iowa Code §§ 216 et seq. Count III alleges the individual defendants tortiously interfered with plaintiff's employment relationship. Defendants now move for summary judgment on all claims.

II. APPLICABLE LAW AND DISCUSSION

A. Summary Judgment Standard

Summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Walsh v. United States*, 31 F.3d 696, 698 (8th Cir. 1994). "When the evidence would support conflicting conclusions, summary judgment should be denied." *Kells v. Sinclair Buick-GMC Truck, Inc.*, 210 F.3d 827, 830 (8th Cir. 2000). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. "As to materiality, the substantive law will identify which facts are material.... Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

"Summary judgment should seldom be used in employment discrimination cases." *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994). Summary judgment should be granted only on the rare occasion where no dispute of fact exists and there is only one conclusion. *Id.* (citations omitted) (quotations omitted). The Court should not grant defendants' summary judgment motion "unless the evidence could not support any reasonable inference for the nonmovant." *Id.* (citations omitted).

B. Whether Summary Judgment is Appropriate on Plaintiff's Disability Claims

Count I of plaintiff's claim alleges HON discriminated against plaintiff on the basis of his disability, in violation of the ADA, when it denied his request to return to work in a light-duty capacity. As acknowledged by this Court in *LeClair v. Wells Fargo Bank of Iowa, N.A.*, 291 F. Supp. 2d 873, 880 (S.D. Iowa 2003): "Courts traditionally have analyzed federal disability claims under one of two frameworks." Claims based exclusively on circumstantial evidence, such as the case at bar, would be evaluated under the familiar burden-shifting approach set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). Once the plaintiff had established a prima facie case of discrimination, the burden shifted to the employer to articulate a legitimate, non-discriminatory reason for the adverse decision. The burden then shifted back to the plaintiff to prove the employer's proffered reason was pretextual for its true, discriminatory motive. *See, e.g., Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1134-45 (8th Cir. 1999) (citing *McDonnell-Douglas*, 411 U.S. at 802-05).

Those with direct evidence of discriminatory motive, often labeled "mixed motive" cases, followed the framework set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Under this latter framework, once the plaintiff had established a prima facie case of discrimination, the defendant must show it would have made the same decision regardless of the plaintiff's disability. *Id.* at 258. If

an employer could not make this showing, the employee would prevail. *Cronquist v. City of Minneapolis*, 237 F.3d 920, 924 (8th Cir. 2001).

Subsequently, in *Desert Palace v. Costa*, 539 U.S. 90, ____, 123 S.Ct. 2148, 2154-55 (2003) the Supreme Court interpreted the 1991 amendments to Title VII, and held that direct evidence is *not* required to obtain a mixed motive jury instruction or prove liability in a mixed motive case. In LeClair, this Court held that in Desert Palace, Supreme Court effectively abandoned the McDonnell-Douglas burden shifting framework in favor of the process set forth in 42 U.S.C. §§ 2000e-2(m) and 2000e-5(2)(B). Pursuant to this statute, a plaintiff alleging that both legitimate and nonlegitimate motives entered into the adverse employment decision need only show that his protected status "was a motivating factor for any employment practice." 42 U.S.C. § 2000e-2(m). "The defendant may then prove its affirmative defense and avoid paying damages if it proves it 'would have taken the same action in the absence of the impermissible motivating factor." LeClair, 291 F. Supp. 2d at 880 (citing 42 U.S.C. § 2000e-5(g)(2)(B)); see also Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 990-93 (D. Minn. 2003) (finding Desert Palace abandoned McDonnell-Douglas); Skomsky v. Speedway SuperAmerica, L.L.C., 267 F. Supp. 2d 995, 998-1000 (D. Minn. 2003) (extending reasoning to ADA context).

To date, the Eighth Circuit has declined to address the impact of *Desert Palace* on the *McDonnell-Douglas* framework, and has continued to apply *McDonnell-Douglas*. *See Allen v. City of Pocahontas*, 340 F. 3d 551, 558 n.5 (8th Cir. 2003). Other courts within the circuit have interpreted the effect of *Desert Palace* in a slightly different fashion. *See, e.g., Brown v. Westaff.*, 2004 WL 67654 at *4-5 (D. Minn. 2004) (finding *Desert Palace* modifies the third step of

McDonnell-Douglas "so that it is framed in terms of whether the plaintiff can meet his or her ultimate burden to prove intentional discrimination, rather than in terms of whether the plaintiff can prove pretext."); Ordahl v. Forward Tech. Indus., Inc., 2004 WL 213189 at *2-3 (D. Minn 2004) (same).

Regardless of *Desert Palace's* true impact, however, all ADA plaintiffs must first establish they are *disabled* under the meaning of the Act. 42 U.S.C. § 12102(2).⁴ Disability is defined in relevant part under the ADA as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; [or]
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). In the present case, plaintiff attempts to establish disability under all three prongs of § 12102(2). *See* Plaintiff's Brief in Support of his Resistance to Defendants' Motion for Summary Judgment ("Plaintiff's Brief") at 9-13.

a. Actual disability

There is no dispute plaintiff suffered a severe back injury, and continues to be impaired to some degree. "Merely having an impairment [however,] does not make one disabled for purposes of the ADA. [A claimant] also need[s] to demonstrate that the impairment limits a major life activity." *Toyota Motor Mfg., Kentucky, Inc., v. Willaims*, 534 U.S. 184, 195 (2002); *Weber v. Strippit, Inc.*, 186

⁴ Plaintiff must also establish he is qualified to perform the essential functions of her position with or without accommodation, and that he suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination. *Kellogg v. Union Pacific Railroad Co.*, 233 F.3d 1083,1086 (8th Cir. 2000) (outlining prima facie case necessary for disparate impact disability discrimination). As discussed below, however, because plaintiff has failed to establish that he is disabled under the Act, the Court need not address these remaining issues.

F.3d 907, 913-14 (8th Cir. 1999); *Wooten v. Farmland Foods*, 58 F.3d 382, 385-86 (8th Cir. 1995). "Major life activity" is defined in the applicable regulations to include: "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1630.2(i). The use of the phrase "such as" indicates that the EEOC did not intend for the list to be exclusive, but rather, illustrative of the types of activities which the EEOC would consider to be "major life activities." *Krauel v. Iowa Methodist Medical Center*, 915 F. Supp. 102, 106 (S.D. Iowa 1995).

In resisting defendants' motion on this basis, plaintiff alleges he "has trouble walking, standing, sitting, lifting and working. He further testified his health continues to be poor." Plaintiff's Brief at 10. The fact plaintiff may experience *some degree of limitation*, however, does not establish he is *substantially limited* in any major life activity.⁵

Rather, the evidence shows that although plaintiff continues to experience pain, he currently is under no work restrictions from his chiropractor. Curry Dep. at 32. He still walks, drives a boat and plays catch with his children. *Id.* at 29. Furthermore, he continues to be able to perform the majority of tasks associated with running Currys' Backhoe, including driving trucks and operating a backhoe. *Id.* at 27. The Court therefore concludes plaintiff has failed to create a material issue of fact as to whether he was "disabled" under the meaning of the ADA at any time relative to this litigation.

⁵ Even assuming plaintiff had asserted he was substantially limited in the major life activity of working, he has failed to create a material issue of fact as to whether he was "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R.§ 1630.2(j)(3)(i) (2002).

b. record of disability

Plaintiff asserts alternatively that he has a record of disability. *See* 42 U.S.C. § 12102(2)(B). "Having a record of a qualifying impairment means that an employee 'has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." *Taylor v. Nimock Oil Co.*, 214 F.3d 957, 961 (8th Cir. 2000) (quoting 29 C.F.R. § 1630.2(k)). The regulations clarify that: "The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. . . . This part of the definition is satisfied if *a record relied on by an employer* indicates that the individual has or has had a substantially limiting impairment." 29 C.F.R. pt. 1630, App. § 1630.2(k) (2002) (emphasis added); *see also Taylor*, 214 F.3d at 961 ("In order to have a record of a disability, *an employee's documentation* must show that she has a history of or has been subject to misclassification as disabled."") (internal citation omitted) (emphasis added).

In the present case, plaintiff stated in his deposition he never provided documentation to HON suggesting he had a *substantially limiting impairment*. Curry Dep. at 32; *see* 29 C.F.R. pt 1630, App. § 1630.2(k) (2002) ("The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's life activities."). The fact HON knew of plaintiff's injury and placed him on *short-term* disability does not establish plaintiff had a record of a "substantially limiting" impairment. *See* 1630.2(j)(2) (expected duration and long-term impact of impairment relevant in determining "substantial limitation"). In fact, plaintiff expressly admitted that, when he would report in to work while on short-term disability, he generally indicated he expected to return to work in a few weeks. *See* Declaration of Julie Link at ¶ 26; *see also* Plaintiff's Response to

Defendants' Statements of Material Facts at ¶ 36. The Court therefore concludes plaintiff is unable to establish a material issue of fact as to whether he had a record of a qualifying disability under 42 U.S.C. § 12102(2)(B) and 29 C.F.R. § 1630.2(k). *See Taylor*, 214 F.3d at 961 ("We do not believe that [the employer's] mere knowledge of Taylor's heart attack, coupled with the sending of a get-well card and a note about her job duties, constitutes sufficient documentation that Taylor had a history of disability or that [the employer] misclassified her as disabled within the meaning of the ADA."); *see also Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220, 1229 (11th Cir. 1999) (finding summary judgment appropriate on plaintiff's claim she had a record of impairment based on fact plaintiff "had not furnished any evidence that [she] had a record of a mental or physical impairment which substantially limited one or more of her major life activities.").

c. regarded as disabled

Plaintiff also contends defendants *regarded* him as having a qualified impairment. *See* 42 U.S.C. § 12102(2)(C). "A person is regarded as having such an impairment if others treat [him] as if [he] is disabled." *Cody v. Cigna Healthcare of St. Louis, Inc.*, 139 F.3d 595, 599 (8th Cir. 1998). In support of this argument, plaintiff points to the fact that HON would not let him return to work "until I was 100 percent." Curry Dep. at 33. Again, however, the record is devoid of evidence defendants believed plaintiff's impairment was anything but short-term in duration. *See* 1630.2(j)(2) (expected duration and long-term impact of impairment relevant in determining "substantial limitation"). Absent evidence defendants perceived plaintiff to have a "substantially limiting" impairment, the Court finds plaintiff is unable to establish a material issue of fact under 42 U.S.C. § 12102(2)(C).

2. Remaining Issues Regarding Plaintiff's ADA Claim

Because the Court finds plaintiff is unable to establish a material issue of fact as to whether he is disabled under the meaning of the ADA, it need not address the remaining elements of plaintiff's prima facie case.

3. Plaintiff's Disability Claim under ICRA

Iowa courts traditionally look to federal statutes, case law and regulations in evaluating disability claims brought under the ICRA. *See, e.g., Fuller v. Iowa Dep't of Human Servs.*, 576 N.W.2d 324, 329 (Iowa 1998). In particular, Iowa courts apply the same definition of "disability" as set forth in the ADA and accompanying regulations. *Id.*

For the reasons outlined above, this Court finds plaintiff is unable to establish a material issue of fact as to whether he is disabled under the meaning of the ICRA. Defendants' motion for summary judgment is granted on count II of plaintiff's complaint.

C. Whether Summary Judgment is Appropriate on Tortious Interference Claim

Count III of plaintiff's complaint alleges defendants Link and Frere intentionally and improperly interfered with plaintiff's employment relationship with HON. To establish this claim under Iowa law, plaintiff must prove: 1) that he had a contract with a third party, HON; 2) that Link and Frere was aware of the contract; 3) that he intentionally and improperly interfered with the contract; 4) that the interference caused HON not to perform; and 5) that plaintiff suffered damage as a result. *Campiano v. Hawkeye Bank & Trust*, 588 N.W.2d 462, 464 (Iowa 1999).

"It is true that one cannot tortiously interfere with a contract to which one is a party." *Hunter* v. *Board of Trustees of Broadlawns Med. Ctr.*, 481 N.W.2d 510, 518 (Iowa 1992). And although Link's and Frere's status as HON employees does not "ipso facto make him a party to" HON

contracts, *see id.*, plaintiff has presented no evidence that either Link or Frere was acting as anything but an authorized agent of HON at all times material to this action. *See*, *e.g.*, *Harbit v. Voss*Petroleum, Inc., 553 N.W.2d 329, 331 (holding plaintiff's claim for tortious interference with contract must fail because all defendants were plaintiff's employers "or their agents").

Furthermore, even if Link and/or Frere were "third parties" capable of interfering with plaintiff's alleged contract, Iowa courts require the interference to be both intentional and improper. "[W]hen the contract at issue in a claim for intentional interference is terminable at will, [courts] require substantial evidence that the defendant's *predominate* or *sole* motive of the interference was to damage the plaintiff." *Condon Auto Sales & Service, Inc. v. Crick*, 604 N.W.2d 587, 601 (Iowa 1999) (citing *Compiano*, 588 N.W.2d at 464) (emphasis added). No such evidence exists in the present case.

Viewing the facts in a light most favorable to plaintiff, the evidence shows Link and Frere initially accepted plaintiff's account of the extent of his disability without requiring documentation from a medical professional, *see* Curry Dep. at 32. When Link and Frere were informed of the fact plaintiff was performing physical labor for Curry's Backhoe while receiving short-term disability payments from HON, they took steps first to verify the information, and then to hear plaintiff's version of events. Link Declaration at 3-4. It was only *after* speaking with plaintiff's chiropractor that Link, Frere and Bedard made the decision to terminate plaintiff.⁶ *Id.* at 5. There is no "substantial evidence" suggesting Link or Frere were in any way motivated to cause financial or personal harm to plaintiff. *See, e.g., Condon*, 604 N.W.2d at 601 (finding summary judgment appropriate on intentional interference claim in absence

⁶ Again, the Court emphasizes it is not accepting as true the statements allegedly made to Bedard by plaintiff's chiropractor.

of "substantial evidence" of plan or motive to harm plaintiff). Summary judgment is appropriately granted on count III of plaintiff's complaint.

III. CONCLUSION

For the reasons outlined above, defendants' motion for summary judgment is granted in full. The Clerk of Court is directed to enter judgment in favor of defendant and against plaintiff.

IT IS SO ORDERED.

Dated this 26th day of February, 2004.

ROMALD E. DONGSTAFF, United States District Court